BRIEF SUPPORTING PETITION FOR REVIEW ON WRIT OF CERTIORARI.

Specification of Errors of Circuit Court of Appeals.

1. The Circuit Court of Appeals erred in affirming the action of the trial court in refusing to interpret to the jury the unambiguous provisions of the contracts sued upon by the petitioner (R. 4742), the said Circuit Court of Appeals having found that the trial court declined to construe and pass upon the different sections of the contracts sued on, except in one or two instances (R. 4742).

2. The Circuit Court of Appeals erred in affirming the action of the trial court in asking the jury, after they had deliberated and reported that they were hopelessly divided where they could reach no decision, how they were numerically divided (R. 4744).

3. The Circuit Court of Appeals erred by holding that the final estimates of the respondent's engineer of the amount of work performed and materials furnished by the petitioner were final and conclusive between the respondent and petitioner (R. 4733-4).

4. The said Circuit Court of Appeals erred by holding that,

> "As to the alleged 'extra work' the evidence is without dispute that no order for extra work was made by the engineer in writing, and that the claims were in excess of $500, the express limit of the engineer's authority under each contract. The provisions of paragraph 9 were completely ignored, and the contractor is not entitled to recover on these claims" (R. 4743).

in that only two claims of the petitioner for extra work exceeded $500 (R. 4297), and in that the engineer of the respondent refused to place any orders in writing for extra

work (R. 475, 486), and the City Commission paid claims of petitioners for extra work in excess of $500 which were not ordered in writing (R. 4292).

5. The said Circuit Court of Appeals erred by holding that the petitioner's

> "officers in charge of the projects made no complaint, submitted no claim, and disputed no estimate until more than three months after the work had been completed, and after the final report had been published by the engineer. It then came forward and made large additional claims" (R. 4743).

in that the petitioner was never consulted on the preparation of partial estimates (R. 461), and that at the time of the receipt by the petitioner of the second and third partial estimates, and during the progress of the work, the appellant requested the City Engineer to place the additional work in the partial estimates, but the Engineer stated that the additional or excess work and material would be paid for in the final estimates (R. 483, 560, 1313-14, 1328, 1449, 1557, 2351, 2353, 2355, 2357, 2360, 2431).

6. The said Circuit Court of Appeals erred in its finding that the petitioner violated the terms of the contracts (R. 4743), there being no evidence in the record to such effect, and the record discloses that the respondent accepted the work as having "been satisfactorily executed according to the plans and specifications" (R. 4349, 4350, 4351, 4352).

7. The said Circuit Court of Appeals erred by holding that Section 54 of the charter of the City of Miami, providing as follows:

> "When it becomes necessary in the opinion of the City Manager to make alterations or modifications in a contract for any public work or improvement such alterations or modifications shall be made only when authorized by the Commission upon the written recom-

> mendation of the City Manager. No such alteration shall be valid unless the price to be paid for the work or material, or both, under the altered or modified contract shall have been agreed upon in writing and signed by the contractor and the City Manager prior to such authorization by the Commission'' (R. 4739).

was important, and applicable to the questions presented in said cause, in that said Section 54 relates wholly to making "alterations or modifications in a contract for any public work or improvement," and no such questions were presented in the case. The questions presented were matters of "changes in the plans and specifications, consistently with the general intention of the contract, for any part of the work or materials" as expressly provided in paragraph 7 of the contracts (R. 4133) and "quantities of work or materials in excess of those named in the Instructions to Bidders and of the same kind," to be "paid for at contract rates," as provided in paragraph 9 of the contract (R. 4134), which "changes in the plans and specifications" and which "increased quantities of work and material" did not in any way alter or modify the contracts with the petitioner for public improvement.

8. The said Circuit Court of Appeals erred by holding that,

> "The Construction Company seeks to escape the terms of the written contracts by alleging that its claims are for additional work; that the work was done and the materials furnished and was accepted by the City; and that the City waived the conditions of the contracts. * * * The alleged changes were not authorized in writing as provided by the contracts, and it is not shown that the City Manager or the Commission ever knew that the alleged additional work was done and materials furnished. Under the facts shown there was no waiver of the requirements of the contracts'' (R. 4742).

in that it has never been the contention of the petitioner that any provisions of the contracts were waived, excepting the sole covenant that "no claims whatever for extra work will be considered or paid, except only when ordered in writing by the Engineer," and only a very minor part of its claims was affected by such covenant, namely; its claims for extra work.

9. The said Circuit Court of Appeals erred by holding that the claims of the petitioner were based on changes, contradictions or variations by parol evidence of the written contracts (R. 4742), in that none of the claims were predicated upon any "change, contradiction or variation by parol evidence" of the contracts, but, with the exception of a claim for extra work amounting to $2,204.62, all the claims were based on written contracts, which provide in paragraph 7 thereof that,

> "The quantities of work and materials given in the Instructions to Bidders are approximate only * * *. The right is expressly reserved for the Engineer to increase or decrease these quantities * * * if such alteration increase the quantities, the added work or material will be paid for along with the original, at the rates stipulated in the contract. * * * If they increase or decrease the quantity or cost of work or materials beyond that described in the specifications and the proposal, the contract price will be accordingly modified * * *" (R. 4132).

10. The Circuit Court of Appeals erred by holding that the respondent was entitled to judgment as a matter of law on the disputed claims of the petitioner under the unambiguous terms of the contracts (R. 4744).

11. The Circuit Court of Appeals erred by affirming the action of the trial court in withdrawing from the consideration of the Jury the claims of the petitioner for excess or additional grading.

Summary of Argument.

POINT A.

The decision of said Circuit Court of Appeals, by holding that the trial court's refusal to interpret to the Jury the unambiguous provisions of the contracts sued on was harmless error (R. 4742), so far departs from the accepted and usual course of judicial proceedings, or so far sanctions such a departure by the lower court, as to call for an exercise of the power of supervision of the Supreme Court of the United States.

The Circuit Court of Appeals found as a matter of fact as follows:

> "The court declined to construe and pass upon the different sections of the contracts, except in one or two instances." (R. 4742.)

The petitioner specified as errors of the District Court such refusal of the trial court to interpret or construe the various provisions of the contracts for the enlightenment of the Jury. (See questions (2), (3), (4), (5) and (6) in this petition under the heading "The Questions Presented to the Circuit Court of Appeals for Decision.")

In the case of *City of Orlando, Florida* v. *Murphy,* 84 F. (2d) 531, the Circuit Court of Appeals for the Fifth Circuit held that where the parties have reduced their agreement to writing, questions as to the construction of the contract are usually for the Court.

In 4 Ency. of Federal Procedure, page 922, it is stated that "the general rule is that it is the duty of the Court to construe written instruments, and to determine the meaning of plain words in whatever form of writing contained."

The refusal of the trial court to interpret the plain provisions of the contracts to the Jury was obviously very prejudicial to the petitioner, and departed from the ac-

cepted and usual course of judicial proceedings. See questions (2), (3), (4), (5) and (6) under the heading in the petition "The Questions Presented to the Circuit Court of Appeals for Decision."

Point B.

The decision of said Circuit Court of Appeals, by holding that the final estimates of the respondent's engineer of the amount of work performed and materials furnished by the petitioner were final and conclusive between the respondent and petitioner, in the absence of bad faith, fraud or deceit of the engineer (R. 4744), is a decision of an important question of local law in a way probably in conflict with applicable local decisions, and is a decision also in conflict with the decision of the Circuit Court of Appeals for the First Circuit on substantially the same matter.

The Circuit Court of Appeals has apparently construed the language contained in paragraph 6 of the contracts sued on (R. 4131) as making the engineer of the respondent sole arbiter of all disputes arising between the parties as to the legal interpretation of the contracts and as to the liability of the respondent to the petitioner (R. 4743).

The pertinent provisions of paragraph 6 are as follows:

> "All work done or materials furnished are to be subject to the acceptance or rejection of the Engineer, who shall in all cases determine the amount, quality, fitness and acceptability of the work and materials to be paid for and decide finally and conclusively all questions or differences of opinion that may arise as to the interpretation of the plans and specifications, or the fulfillment of the terms of this contract; and in the event of such question or difference, his decision is to be a condition precedent to the contractor's right to receive any money from this contract." (R. 4131.)

Said paragraph in the contracts clearly relates, and only relates, to the complete supervision and direction of the work during its progress, and the City Engineer's decision is made final and conclusive on questions arising during the progress of the work as to what is required by the contracts and in what manner it is to be done. This is necessarily so because it would not be practicable to cease operations and resort to a lawsuit every time a difference of opinion might arise during the progress of the work; but when the petitioner has followed the decision of the City Engineer and performed the contracts in accordance with his decision, then it becomes a question of law whether the petitioner is entitled to compensation for any particular item of work done at the direction of the City Engineer. Substantially the same question was before the Circuit Court of Appeals for the First Circuit in the case of *Gammino* v. *Town of Dedham*, 164 F. 593, and the Court held:

> "The jurisdiction of the engineer relates to disputes arising in the performance of the work which might prevent the work from progressing unless determined on the spot. The questions now presented are those which arose after the completion of the contract. The clause cannot be interpreted so as to deprive the parties of their rights to a judicial construction of the contract, so far as such construction involves matters of law relating to the present right of the plaintiff to maintain suit, and relating to the question whether the plaintiff has received such compensation as he was legally entitled to under the provisions of the contract, and under the evidence as to the acts of the parties not in terms fully covered by the express provisions of the contract." (Text 600.)

The Circuit Court of Appeals for the Fifth Circuit supported its ruling with the cases of *Duval County* v. *Charleston Engineering Co.*, 101 Fla. 810, 134 So. 509; *United*

States v. *Gleason*, 175 U. S. 588; *Sweeney* v. *United States*, 109 U. S. 618; and *Martinsburg* v. *Potomac R. R. Co.*, 114 U. S. 549.

In *Duval County* v. *Charleston Engineering Co., supra*, cited by the Circuit Court of Appeals, the Supreme Court of Florida held:

> "Final estimate may not be given conclusive effect as a final settlement of disputes arising under the contract, which disputes are legal in their nature and depend upon construction of the terms of the contract, their application to particular circumstances, and the like, for settlement." (Text 517.)

The record discloses very little dispute between the petitioner and respondent as to the amount of the work done and materials furnished (R. 497, 516, 636-7, 1038, 1071, 1448-9, 2357, 3309-10, 3351, 3413, 3510, 3531, 3551-2, 3602, 3702, 4214 to 87, 4311, 4433, and 4473 to 77), the dispute being primarily one of interpretation to be placed upon certain provisions of the contracts, and not one of the amount of work done or material furnished. The engineer for the respondent, in the preparation of his final estimates, proceeded to place his own interpretation on the contracts (R. 3428 to 3431), and excluded from his final estimates the petitioner's claims for additional work and material because at variance with his opinion of the interpretation of the contracts.

The holding of the Circuit Court of Appeals, in the case at bar, to the effect that inasmuch as the petitioner

> "made no attempt to show that the engineer, the city, or its agents were guilty of bad faith, fraud, or deceit, it may not recover" (R. 4744),

is quite inapplicable, because the dispute being primarily one of contract interpretation, there was no occasion to

attempt to show "bad faith, fraud, or deceit" on the part of the "engineer, the City, or its agents."

The Circuit Court of Appeals, in relying upon the foregoing Federal decisions, completely ignores the evidence as to the respondent's conduct in this case, which evidence makes inapplicable the principles announced in those decisions.

The record conclusively reveals that the respondent took a position concerning the final estimates of its engineer which implied that all such final estimates were erroneous, in the adoption of a resolution to arbitrate not only the claims asserted by the petitioner, but likewise its pretended claim against the petitioner (R. 3628-4354 —). Although it subsequently rescinded that resolution, it nevertheless filed an action against the petitioner by way of a counterclaim in this proceeding (R. 240). In filing a counterclaim, the respondent completely abandoned that provision of the contracts upon which the Court of Appeals' decision is grounded, and accordingly denied the correctness of the City Engineer's estimates. This counterclaim remained in the case for several years and was not withdrawn until after final argument before the Jury (R. 3913).

The Court, in the case of *Duval County* v. *Charleston Engineering Construction Co., supra,* did not introduce into the law of the State of Florida a new principle of law when it held:

> "Such a covenant is regarded as for the protection of the one who employs the contractor to perform work, and who designates the engineer who is to act under the contract of employment, and it is clear that such provision can be waived by failure to insist on it and taking a position which implies the contrary." (Text 516 So.)

The same court, in *Campbell et al.* v. *Kauffman Milling Co.,* 42 Fla. 328, 29 So. 435, many years prior to its decision

in the *Duval County* case, had approved and adopted the rule as stated in Bigelow on Estoppel, that

> "A party cannot, either in the course of litigation or in dealing in pais, occupy inconsistent positions. Upon that rule election is founded. A man shall not be allowed to approbate and reprobate. And where a man has an election between several inconsistent courses of action, he will be confined to that which he first adopts. The election, if made with knowledge of the facts, is in itself binding. It cannot be withdrawn without due consent. It cannot be withdrawn though it has not been acted upon by another by any change of position." (Text 435 So.)

In the later decision of *Mizell Live Stock Co.* v. *McCaskill Co.*, 62 Fla. 239, 56 So. 391, it was held that the doctrine of election of remedies applies to the "first pronounced act of election." The filing of a counterclaim was a "pronounced act of election," from which position the respondent could not thereafter withdraw.

The Court, in the *Duval County* case, also gave force and effect to the principle announced in *Gammino* v. *Inhabitants of the Town of Dedham,* 164 Fed. 593, in holding that,

> "It is likewise the rule that an ambiguous clause in a construction contract will be construed so as not to confer upon an engineer * * * power to decide legal questions arising out of the contract or its performance." (Text 515 So.)

Thus it appears that the decision of the Circuit Court of Appeals in the instant case is not only in conflict with the decision of the Circuit Court of Appeals for the First Circuit, but that it has decided an important question of local law in a way probably in conflict with applicable local decisions.

POINT C.

The decision of said Circuit Court of Appeals, by affirming the action of the trial court in asking the Jury, after they had deliberated and reported that they were hopelessly "tied up" to where they could reach no decision (R. 4092), how they were numerically divided (R. 4093), and by holding that the error was lost to the petitioner, because of its failure to object or except to such action of the trial court (R. 4744), is a decision of an important Federal question in a way probably in conflict with applicable decisions of the Supreme Court of the United States.

The Circuit Court of Appeals held that, under "Rule 46 of the Rules of Civil Procedure for District Courts," the alleged error of the trial court in asking the Jury how they were numerically divided was lost to the petitioner, because it failed to make an objection to such action of the District Court (R. 4744).

The Supreme Court of the United States, in *Brasfield* v. *United States*, 272 U. S. 488, 71 L. Ed. 345, held:

> "It is reversible error for the trial judge to inquire, after the jury has for some time failed to agree, as to how they are numerically divided."

The Circuit Court of Appeals for the Eighth Circuit, in *St. Louis & S. F. R. Co.* v. *Bishard*, 147 Fed. 496, held the rule above announced in the *Brasfield* case, which was a criminal case, is equally applicable to cases of a civil character, page 500 of text.

Rule 46 of the Rules of Civil Procedure, referred to by the Circuit Court of Appeals for the Fifth Circuit, is as follows:

> "Exceptions Unnecessary. Formal exceptions to rulings or orders of the Court are unnecessary; but for all purposes for which an exception has heretofore

> been necessary it is sufficient that a party, at the time the ruling or order of the Court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

The only part of the above rule which could have any application to the question presented by said alleged error is as follows:

> "but for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or his objection to the action of the court and his grounds therefor."

It is apparent that the procedure prescribed by Rule 46 is intended to accomplish no more than the formal exception under the prior rules. In *Brasfield* v. *U. S., supra,* it was held that:

> "The failure of petitioners' counsel to particularize an exception to the court's inquiry does not preclude this court from correcting the error. * * * This is especially the case where the error, as here, affects the proper relations of the court to the jury, and cannot be effectively remedied by modification of the judge's charge after the harm has been done." (Text 450 U. S.)

The record reveals that the action of the trial court in asking the Jury how they were numerically divided came with dramatic swiftness on the announcement of the Jury that it was "hopelessly tied up," and that the appellant did not expressly or impliedly consent to such action of the trial court (R. 4092-3). The court acted, in this re-

spect, without giving the slightest intimation of what he was going to do. The question presented here is one of proper relations of the trial court to the Jury, and could not have been effectively remedied by modification of the trial court's charge even if a formal objection had been made. The incident, and what immediately followed the incident, all being clearly prejudicial to the petitioner, will be found on pages 4092 to 4099 of the record.

POINT D.

The decision of said Circuit Court of Appeals, by holding that the respondent was entitled to judgment as a matter of law on the disputed claims of the petitioner under the unambiguous terms of the contracts sued on by petitioner (R. 4744), so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the Supreme Court of the United States.

The seven contracts sued on (R. 4122 to 4213) contained general provisions as follows:

> Par. 6. "The supervision of the execution of this contract is vested wholly in the Engineer, and the orders of the Commission of the City of Miami are to be given through him. The instructions of the Engineer are to be strictly and promptly followed in every case" (R. 4131).
>
> Par. 7. "The quantities of work and material given in the instructions to bidders are approximate only and intended for the comparison of bids. The right is expressly reserved for the Engineer to increase or decrease these quantities * * *, if such alterations increase the quantities, the added work or material will be paid for along with the original at the rates stipulated in the contract * * *. The right is further reserved to change the plans and specifications * * * notice of such changes being given in writing to the

> Contractor * * *. If they increase or decrease the quantity or cost of work or material beyond that described in the specifications and the proposal, the contract price will be accordingly modified" (R. 4132).
>
> Par. 9. "Quantities of work or material in excess of those named in the instructions to bidders, and of the same kind, are not to be considered as extra work, and such excess, when ordered by the Engineer, will be paid for at contract rates. Aside from the work thus included in the schedule, no claim whatever for extra work will be considered or paid, except only when ordered in writing by the Engineer at a price stated in the order * * * and when the claim is made in writing before the next monthly estimate and accompanied by the order authorizing its performance * * *. The Engineer's authority to order extra work is expressly limited to $500 on this contract, unless specifically authorized by the Commission of the City of Miami to exceed this amount" (R. 4134).

The testimony is abundant to the effect that the engineer of the respondent increased the quantities of the work and material.

It will be noted that the contracts provide that such added work or material will be paid for, along with the original, at the rates stipulated in the contracts, and that such increased or additional quantities are not to be considered as extra work.

The Circuit Court of Appeals, in holding that the respondent was entitled to judgment as a matter of law on the disputed claims under the unambiguous terms of the contracts sued on, evidently did so because such additional work was not ordered by the engineer of the respondent in writing. The contracts clearly do not require additional quantities of work or material to be ordered in writing, such provision being applicable only to extra work as defined by the contracts and changes in plans and specifica-

tions; and further, the evidence is conclusive that the engineer for the respondent refused to place any of his orders in writing by stating that he was not going to be bothered with giving written orders (R. 475, 486).

In *Wood et al.* v. *City of Fort Wayne,* 119 U. S. 312, 30 L. Ed. 416, the contract contained a provision similar to the one here involved, as follows:

> "The said trustees shall have the right to make any alterations in the extent, dimensions, form or plan of the work contemplated by this contract, either before or after the commencement of construction. If such alterations diminish the quantity of work, the price paid shall be proportionately diminished, and no anticipated profits allowed for the work omitted. If they increase the work, such actual increase to be paid for at contract rate for work of its class."

The defendant pleaded as follows:

> "As to the third paragraph of the complaint, the answer, in its sixth paragraph, avers that all the materials were furnished, and all the labor was performed, under the written contract, at prices specially set forth therein; that the contract price has been fully paid; and that no written order was made by the city engineer and the trustees, directing the plaintiffs to furnish any extra materials or do any extra work."

The Supreme Court of the United States held:

> "We are of opinion that the court erred in its view of the rights of the plaintiffs under the contract. The clause providing that no claim for extra work shall be made or entertained, unless such extra work shall have been done in obedience to a written order of the engineer and trustees, is an independent clause from that which provides that the trustees shall have the right to make any alterations in the plan of the work, either before or after its commencement; and the extra work referred to in the former clause does not embrace

> work done in pursuance of an alteration made by the trustees in the plan. The latter work may be, in one sense, extra work; but if it results from an alteration of plan by the trustees, and there is, in consequence, an increase in the quantity of work, the actual increase is to be paid for at the 'contract rate for work of its class.' The extra work referred to in the former clause required the authoritative written order of the engineer and trustees; but, as the trustees had the right to alter the plan, work done to carry out such alteration, when made by the trustees, was authorized by the trustees, in a manner equivalent to a written order by them and the engineer."

POINT E.

The decision of said Circuit Court of Appeals, by affirming the action of the trial court in withdrawing from the consideration of the Jury the claims of the petitioner for additional grading, regardless of the evidence, as being purely questions of law, so far departs from the accepted and usual course of judicial proceeding as to call for an exercise of the power of supervision of the Supreme Court of the United States.

The trial court withdrew from the consideration of the Jury the above mentioned claims of the petitioner (R. 3988).

The bidding blanks provided for a price to be submitted for grading by the square yard (R. 4127). In order to bid a price for grading on the basis of a square yard, the depth of the grading must be known. Profiles were supplied by the respondent for the purpose of furnishing this information (3010). It was impossible to determine the depth of grading from the profiles because errors existed therein (R. 769). Paragraph 4 of the Instructions to Bidders provided that if any errors were discovered in the plans the same must be brought to the attention of the engineer for the respondent in order that the necessary explanations or corrections might be made (R. 4123). The petitioner

brought to the attention of said engineer the errors in the profiles prior to bidding, and was told by said engineer that the grading or excavation would not exceed, on an average, nine inches over the work as a whole (R. 769, 2297), and a bid was made accordingly. The respondent admits that the grading greatly exceeded an average cut of nine inches, and that petitioner has not been paid for such excess.

The trial court having admitted substantial evidence of the petitioner's claims for such excess grading, it is axiomatic that the trial court should have left said claims for the determination of the Jury.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Dated this 4th day of June, 1942.

WILLIAM H. BOYD,
2500 Terminal Tower,
Cleveland, Ohio,

JAMES E. CALKINS,
and
ROBERT H. ANDERSON,
Ingraham Building,
Miami, Florida,
Counsel for Petitioner.